STATE OF MICHIGAN

COURT OF APPEALS

DAVID M. AHO,

Plaintiff-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

UNPUBLISHED
February 1, 2007

No. 262822
Marquette Circuit Court
LC No. 00-037785-NZ

Before: White, P.J., and Zahra and Kelly, JJ.

WHITE, P.J. (*dissenting*).

I respectfully dissent. The circuit court did not abuse its discretion by denying defendant's motion to tax costs and attorney fees under the interest of justice exception, MCR 2.403(O)(11). Among the circuit court's reasons for denying defendant's motion were that plaintiff's claims involved unsettled areas of the law and issues of significant public interest.[1] These are well-established permissible reasons for invoking the interest of justice exception. See *Haliw v Sterling Heights (On Remand)*, 266 Mich App 444, 448-449; 702 NW2d 637 (2005), particularly its discussion of *Luidens v 63rd Dist Court*, 219 Mich App 24, 35-36; 555 NW2d 709 (1996) (noting "the unusual circumstances necessary to invoke the 'interest of justice' exception may occur where a legal issue of first impression is presented," or where the law is unsettled, or "where the effect on third persons may be significant.")

As discussed in *Aho v Dep't of Corrections*, 263 Mich App 281; 688 NW2d 104 (2004), plaintiff's two-count complaint[2] alleged that defendant violated a rarely invoked section of the Civil Rights Act (CRA), MCL 37.2205a, under which an employer *other than a law enforcement agency* "shall not . . . in connection with the terms, conditions or privileges of employment . . . make or maintain a record of information regarding an arrest . . . in which a conviction did not

[1] Among the other reasons were that defendant, as well as plaintiff, rejected the $150,000 mediation evaluation; that because this was a civil rights case, assessment of costs and fees may have a chilling effect on future plaintiffs alleging civil rights violations; and that by virtue of the fact that plaintiff is totally disabled, the disparity between the parties is vast.

[2] Plaintiff's complaint, filed in 2001, alleged violation of the CRA, and retaliatory discharge in violation of the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*.

result." (Emphasis added.) When plaintiff was arrested on July 12, 1999, only an Attorney General opinion addressed whether the Department of Corrections (DOC) was a law enforcement agency. In March 2000, ten days before plaintiff was discharged, but six months after the relevant criminal charge was dismissed without conviction, the Legislature amended § 305a of the CRA, MCL 37.2205a, to include the DOC in the definition of law enforcement agency. 1999 PA 202.

The parties brought cross-motions for summary disposition in the circuit court. The circuit court dismissed plaintiff's CRA claim based on its determination that "in light of the enactment of 1999 PA 202 only six months after the issuance of the Attorney General's opinion, the Legislature always considered the MDOC to be a law enforcement agency and, thus, exempt from the provisions of § 205a." *Aho, supra*, 263 Mich App at 293-294. The circuit court denied defendant's motion to dismiss plaintiff's retaliatory discharge claim.

Defendant appealed and plaintiff cross-appealed. See *Aho, supra*. On appeal, plaintiff argued that the circuit court erred in holding that the DOC was exempt from § 205a of the CRA, "that defendant was required to follow the Attorney General's opinion and purge plaintiff's arrest record from its files," and that "the amendment of the statute should not be given retroactive effect to legitimize defendant's retention of the record of his arrest for marijuana possession, which was the basis for his discharge." *Aho*, 263 Mich App at 294. The *Aho* Court found it "unnecessary to reach the question whether the legislative action was curative and, therefore, to be given retroactive effect," noting that defendant knew of plaintiff's arrest through sources other than its retention of his actual arrest record. *Id.* The *Aho* Court remanded to the circuit court for entry of an order dismissing plaintiff's retaliatory discharge claim (having affirmed the dismissal of plaintiff's CRA claim).

On remand, defendant filed a motion to tax costs and for attorney fees. The circuit court denied defendant's motion for reasons including that the case presented issues both of first impression and of significant public interest. These are recognized permissible reasons for invoking the interest of justice exception: "the unusual circumstances necessary to invoke the 'interest of justice' exception may occur where a legal issue of first impression is presented," or where the law is unsettled, or "where the effect on third persons may be significant."[3]

The majority reverses, concluding that "[t]he issue whether defendant was a law enforcement agency for purposes of the CRA was not entirely clear at the time plaintiff filed suit; however, that issue was resolved by the Legislature, not this litigation." However, the issue of first impression presented regarding plaintiff's CRA claim was whether the amendment to the CRA should operate prospectively or be given retroactive effect. There was no controlling precedent on this point, thus an issue of first impression was presented.

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[3] *Haliw v Sterling Heights (On Remand)*, 266 Mich App 444, 448-449; 702 NW2d 637 (2005) [quoting discussion of *Luidens v 63rd Dist Court*, 219 Mich App 24, 35-36; 555 NW2d 709 (1996), in *Haliw v Sterling Heights*, 257 Mich App 689; 699 NW2d 563 (2003), rev'd on other grds 471 Mich 700; 691 NW2d 753 (2005)].

I also disagree with the majority's reversal on the basis that the *Aho* Court's "decision that the passage of five years between plaintiff's participation in protected activity, the lawsuit regarding facial hair, and his termination precluded the finding of a nexus between the two events *was not particularly significant in light of authority that much shorter periods precluded the finding of a causal connection.*" The majority fails to take into account that there were no Michigan cases on point, as evidenced by the *Aho* Court's citation only to federal court decisions, none of which are binding on this Court. See *Aho,* 263 Mich App at 291-292.

I conclude that the circuit court did not abuse its discretion[4] and would therefore affirm.

/s/ Helene N. White

[4] In my view, the foregoing undermines a conclusion that the denial of defendant's motion constitutes a result that is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." See *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000) (defining "abuse of discretion.")